No. 152.

Filed Feb. 3, 1899.

Court of Appeals of Kentucky.

JANUARY TERM, 1899.

CITY OF OWENSBORO, Appellant,

VS.

COMMONWEALTH OF KY., ET. AL., Appellees.

APPEAL FROM DAVIESS CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PAYNTER.

STANDARD PRINTING CO., 405 MAIN ST., FRANKFORT KY.

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VS.
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APPEAL FROM DAVIESS CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PAYNTER.

This appeal involves the question as to the right of the Commonwealth to compel the city of Owensboro to pay taxes upon property as follows, to-wit:

1. The fire department property including engine-houses and grounds on which situated, fire-engines, hose, reels, hook and ladder wagons, hose and necessary horses.

2. A public park of the city.

At the time the case of the city of Louisville vs. Commonwealth, 1 Duvall, 295 was decided, there was no statute defining what part of the property belonging to municipalities should pay tax, or what part should be exempt from taxation. The language of the statute then in force was so comprehensive as to embrace all property as taxable which belonged to municipalities. The Court held that the law constructively applied to persons only and not at all to public bodies exercising, in different degrees, the sovereignty of the State, and that "the city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized

legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality."

The Court was of the opinion that the exception, specified in the statute, did not imply that municipal property, "*used for public purposes of local government*," was to be taxed and adjudged the property of the city of Louisville, "*used for carrying on its municipal government*," was exempt from taxation. In determining what property was *constructively* subject to, and what was exempt from taxation under the statute, it said:

"Whatever property, such as court-house, prison and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from State taxation; but whatever is not so used, but is owned and used by Louisville in its *social or commercial capacity* as a private corporation, *and for its own profit*, such as vacant lots, market-houses, fire-engines and the like, *is subject to taxation*. If, however, as just indicated, the property owned by the city as a private corporation, is not used for profit to the city, but is dedicated to *charity*, it is not constructively subject to taxation under any existing law."

The effect of the opinion is that, under the statute, the Court could not adjudge any property belonging to the municipality exempt from taxation except such as was used for *charity, or used or needed for a governmental purpose*, and the Court concluded that *engine-houses* were not used or needed for that purpose.

The opinion of the Court in *1 Duvall* is criticised by Dillon on Municipal Corporations, section 774, note 1, wherein it is in effect said the exemption by implication should have extended to all the property of the city sought to be taxed.

Cooley on Taxation, 173–4, likewise criticises the opinion by saying it limits the implied exemption unreasonably.

We recognize as just in part the criticism made by the learned authors. The case was decided in February, 1864,

and at a time when the General Assembly was in session. That body evidently was of the opinion that the Court did not give the construction to the statute which the legislative department of the government intended it to have, for on the 22d of February, 1864, an act was approved which provides: "That all property belonging to any city or town of this Commonwealth, and which is necessary to the carrying on the government of such city or town, viz: "Police court-houses, mayor's offices, including offices for the various city or town officers in said buildings, fire-engine houses, engines and horses belonging thereto, work-houses, alms-houses, hospitals, pest-houses, together with the grounds belonging thereto, be, and the same is, hereby exempt from all taxation."

By the express declaration of the act, engines and engine-houses were necessary to carrying on the government of cities. This statute remained in force until the enactment of the "Hewitt Law," in which there was a clause for the exemption of property belonging to counties, cities and towns in the following language, to-wit:

"Property owned in its entirety by counties, cities and towns, which is necessary to carry on the government of such county, city or town. (General Statutes, edition 1828, p. 1036.") This provision remained in force until the adoption of the present Constitution, section 170 of which reads as follows:

"There shall be exempt from taxation public property used for public purposes."

From this section it must be determined whether or not the municipality must pay taxes upon the property mentioned.

It is hardly necessary to observe that a municipality is an arm of the State, an "effluence" from its sovereignty, and is an instrumentality by which the State seeks to give to its citizens the best government possible. The police force of a city is for the protection of the lives and property of the citizens of the State; but especially within

the limits of the municipality, and the cost of maintaining it is paid at public expense. The firemen of a municipality are paid out of taxes levied for that purpose, and they are maintained to protect the lives and property of citizens of the Commonwealth. The firemen of a city are just as essential to its safety and proper government as is its police force. The fire department can only be effective by having engines, engine-houses and appliances which are usual in meeting the demands on the department. The property of a city, used in connection with its fire department, is, in our opinion, *public property used for public purposes*, and is necessary to its government.

Hickman Park is a public park maintained at public expense, not for profit, but for the public good. It is open to the rich and poor alike, whether they live in or outside the city. The municipal authorities are charged with the duty of maintaining the public health, and, in the judgment of scientific men, it is essential to the public health that cities have and maintain parks where the people can breathe wholesome air. People of this enlightened age justify the levying of taxes to maintain them. They are just as much public property used for public purposes as are the streets and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. The public have access to and enjoy both. In our opinion the public park is public property, used for public purposes, and necessary to the proper government of a city. Besides, why should an "effluence" from the sovereignty pay taxes to it on property which is essential to the proper discharge of the duty imposed of maintaining the public health?

The judgment is reversed for proceedings consistent with this opinion.

Judge Guffy dissenting.

Judge White dissenting.

J. A. DEAN for appellant.

W. S. MORRISON and T. L. KARN for appellees.

Brief for Defendant in Error.

Filed Dec. 27, 1898.

Supreme Court of the United States of America.

No. 152.

CITY OF COVINGTON, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

W. S. TAYLOR,
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Supreme Court of the United States of America.

CITY OF COVINGTON, ... Plaintiff in Error,

vs. } **Brief for Defendant in Error.**

COMMONWEALTH OF KENTUCKY, . Defendant in Error.

By an act of the General Assembly of the Commonwealth of Kentucky, approved May 1, 1886, entitled "An act to amend the charter of the city of Covington," the city of Covington was authorized and empowered to issue bonds and with the proceeds thereof to build a water-works, reservoir, etc., in Campbell county, Kentucky.

It was provided in section 31 of said act, that "said reservoir or reservoirs, pumping-house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall

be and remain forever exempt from State, county and city taxes."

The city of Covington in conformity with the said act purchased property and built a water-works in Campbell county, Kentucky, worth nearly a million dollars, from which it sells water to its own inhabitants as well as those of the neighboring towns.

In 1894 the assessor of Campbell county, assessed the property of the Covington Water-works for State and county taxation for the year 1895; the city of Covington, the owner, refused to pay the tax.

This action was brought to recover possession of said water-works property for the State.

The city of Covington contends that the exemption from taxation in the charter constitutes a contract within the meaning of the Constitution of the United States, which says, "That no State shall pass any law impairing the obligation of contracts."

The defendant in error, the Commonwealth of Kentucky, contends that the property is subject to assessment and taxation, and that the acts of the assessor, Board of Supervisors and sheriff of Campbell county, in assessing and taxing the said water-works property, were valid; and that the clause in the act, approved May 1, 1886, exempting the said water-works property from taxation is unconstitutional, and that this court has no jurisdiction over this case, for the following reasons, to-wit:

First. The Constitution of Kentucky, which became a law on June 11, 1850, and was in full force and effect in 1886, when the Legislature passed and approved the "act to amend the charter of the city of Covington," which exempted the property of the Covington Water-works from taxation, declares,

"That no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services." See article 13, section 1.

It is respectfully submitted to your honors that the exemption of this property would be a violation of this section of the Constitution.

The following cases are cited in support of this:

Commonwealth v. Makibben, 90 Ky., 384.

Wm. Clark v. Louisville Water Co., 90 Ky., 517.

Sutton's Heirs v. City of Louisville, 5 Dana, Ky., 28-31.

Lancaster v. Clayton, 86 Ky., 373.

Second. By a general law of the General Assembly of Kentucky, entitled "An Act reserving power to amend or repeal charters and other laws, approved February 14, 1856, the Legislature reserved the right to amend or repeal all laws, in the following language, to-wit:

Section 1. "That all charters, and grants of, or to corporations or amendments thereof, and all other statutes, shall be subject to amendment or repeal, at the will of the Legislature, unless a contrary intent be therein plainly expressed."

It is respectfully submitted that the General Assembly having reserved the right to amend or repeal charters, and other laws, by the general act, approved February 14, 1856, it could, at will, amend or repeal the act "to amend the charter of the city of Covington," which was approved May 1, 1886; and that said act was amended or repealed by sections 171 and 172 of the present Constitution of Kentucky, approved September 28, 1891, which provides:

"Sec. 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each

fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"Sec. 172. All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

And also by section 2 of an act of the General Assembly of Kentucky, approved November 11, 1892, entitled "An act relating to revenue and taxation;" and being section 4020 of the Kentucky Statutes, provides:

"Sec. 2. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Section 1 of the division entitled "Conclusion" of said act of November 11, 1892, is as follows:

"Sec. 1. All acts and parts of act in conflict with this act are hereby repealed, except an act, entitled 'An act to provide additional funds for the ordinary expenses of the State gov-

ernment,' approved June 4, 1892, and also except an act amendatory thereof, approved July 6, 1892."

In section 170 of the new Constitution, after an enumeration of the property which shall be exempt from taxation, it is provided:

"All laws exempting or commuting property from taxation, other than the property above mentioned, shall be void."

Holyoke Water Co. v. Lyman, 15 Wall., 500.

Miller v. N. Y., 15 Wall., 478.

Union P. R. Co. v. Phila., 101 U. S., 528.

Louisville Water Co. v. Wm. Clark, Sheriff, 143 U. S., 1.

Third. The act of the General Assembly of Kentucky, entitled "An act to amend the charter of the city of Covington," approved May 1, 1886, in which the property of the Covington Water-works was exempted from taxation, was a *public law*, relating to a *public subject*.

It is respectfully submitted, that any privilege granted to a public subject by a public law, may be withdrawn at any time, as the power of the Legislature over a municipality is supreme.

See the following cases, to-wit:

Layton v. New Orleans, 12 La. Ann., 518.

Tinsman v. Bellvidere R. Co., 26 N. J. L., 148.

Jersey City v. New Jersey, 20 N. J. Eq., 360.

Raders v. Southerly Rd. Dist., 36 N. J. L., 273.

Williamson v. State, 46 N. J. L., 204; 44 N. J. L., 165.

Spring Valley W. Wks. v. San Francisco, 61 Ca., 3; 8 Sawy. U. S., 555.

Williamson v. New Jersey, 130 U. S., 189.

New Orleans v. N. O. W. Wks. Co., 142 U. S., 44.

Blessing v. Galveston, 42 Texas, 641.

Washburn v. Oshkosh, 60 Wis., 453.
Smith v. People, 140 Ill., 355.
Stone v. Mississippi, 101 U. S., 814, 1079.
Newton v. Mahoning Co., 100 U. S., 548.
East Hartford v. H. Bdge. Co., 10 How., 511.
Same v. Same, 10 How., 541.
Berlin v. Gorman, 34 N. H., 266.
Trustees v. Tatman, 13 Ills., 27.
People v. Morris, 13 Wend., N. Y., 331.
St. Louis v. Russell, 9 Mo., 507.
Louisville v. University, 15 B. Mon., Ky., 642.
Montpelier v. East M., 29 Ver., 12.
Brighton v. Wilkinson, 2 Allen, Mass., 27.
Reynolds v. Baldwin, 1 La. Ann., 162.
Cooley's Con. Lim., 193.
Black on Con. Prohibitions, section 44.
1 Dillon on Municipal Corporations, secs. 24, 30-37.
2 Story on Const., sec. 1393.
2 Kent., 305.

Fourth. A charter of incorporation is not a contract; to constitute a contract a consideration must be shown, or in other words, a legal contractual obligation.

There are conflicting decisions upon this proposition, it having been decided that a charter of incorporation was a contract; and, again, that it was not.

It is respectfully submitted that a careful review of the authorities show that those cases in which a charter was held to be a contract, was where the purpose of the corporation was a public benefit, as, for instance, the case of the Home of the Friendless. The settled doctrine is, that a consideration must be shown.

See the following cases:

Christ Church v. Co. of Phila., 24 How., 300.

Tucker v. Ferguson, 22 Wallace, 527.

Welsh v. Cook, 97 U. S., 541.

West Wisconsin R. Co. v. Trempealean Co., 93 U. S., 595.

East Saginaw Salt Mnfg. Co. v. E. Saginaw, 13 Wall., 373.

Lord v. Town of Lichfield, 36 Conn., 116.

Bradley v. McAtee, 7 Bush, 667.

Louisville R. Co. v. Com., 10 Bush, 43.

The Home of the Friendless v. Rouse, 8 Wall., 430.

Washington University v. Rouse, 8 Wall., 439.

St. Anna's Asylum v. New Orleans, 105 U. S., 362.

Respectfully submitted,

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